DEC 19 2002
CLERK

No. 01-679

IN THE

Supreme Court of the United States

GONZAGA UNIVERSITY and ROBERTA S. LEAGUE,

Petitioners,

v.

JOHN DOE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE WASHINGTON SUPREME COURT

BRIEF IN OPPOSITION

LAUREL H. SIDDOWAY
Counsel of Record
GEORGE M. AHREND
DAVID J. GROESBECK
RANDALL & DANSKIN, P.S.
Attorneys for Respondent
601 W. Riverside Ave., Ste. 1500
Spokane, WA 99201
(509) 747-2052

171308

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

	Page
Table of Contents	i
Table of Cited Authorities	ii
Statutory Provisions Involved	1
Introduction	1
Statement of the Case	2
Reasons for Denying the Writ	11
I. The Joint Participation Of Gonzaga And The Office Of The Superintendent Of Public Instruction In The FERPA Violation And Gonzaga's Defense Of The Offending Disclosures As State-Directed Brings The Circumstances Of This Case Squarely Within This Court's "State Action" Jurisprudence.	11
II. Virtually No Conflict Exists Within The Federal Courts As To FERPA's Creation Of Federal Rights.	15
III. The Overwhelming Majority Of Federal Courts Have Correctly Decided The Issue Of Whether FERPA Creates Rights In Students And Their Parents Under All Of The Court's Precedents, Including *Suter v. Artist M.* And *Blessing v. Freestone.*	19
Conclusion	27
Appendix — Relevant Statutes And Regulations	1a

TABLE OF CITED AUTHORITIES

	Page
Cases:	
Achman v. Chisago Lakes Indep. Sch. Dist. No. 2144, 45 F. Supp.2d 664 (D. Minn. 1999)	16
Adams v. Lewis University, 1999 US Dist. LEXIS 3413 (N.D.Ill. 1999)	16
Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970)	11
Altschuler v. University of Pennsylvania Law School, 1997 WL 129394 (SDNY 1997)	16
Belanger v. Nashua Sch. Dist., 856 F. Supp. 40 (D.N.H. 1994)	16
Blessing v. Freestone, 520 U.S. 329, 117 S. Ct. 1353, 137 L. Ed. 2d 569 (1997)	*passim*
Brentwood Academy v. Tennessee Secondary School Athletic Association, et al., 531 U.S. 288, 121 S. Ct. 924, 148 L. Ed. 2d 807 (2001)	12, 14
Brouillet v. Cowles Pub. Co., 114 Wash. 2d 788, 791 P.2d 526 (1990)	5
Brown v. City of Oneonta, 106 F.3d 1125 (2d Cir. 1997)	16

Cited Authorities

	Page
Cort v. Ash, 422 U.S. 66 (1975)	17
Cullens v. Bemis, No. 91-73980, 1992 WL 337688 (1992)	16
Doe v. Knox County Bd. Of Ed., 918 F.Supp. 181 (E.D.Ky. 1996)	16
Falvo ex rel. Pletan v. Owasso Indep. Sch. Dist. No. I-011, 233 F.3d 1203 (10th Cir. 2000), *cert. granted*, 150 L. Ed. 2d 715, 121 S. Ct. 2547 (2001)	16
Fay v. South Colonie Cent. Sch. Dist., 802 F.2d 21 (2d Cir. 1986)	16
Flagg Bros., Inc. v. Brooks, 98 S. Ct. 1729, 436 U.S. 149 (1978)	11
Francois v. University of District of Columbia, 788 F. Supp. 31 (D.D.C. 1992), *aff'd*, 1993 US App. LEXIS 5051 (App. D.C.)	16
Gundlach v. Reinstein, 924 F. Supp. 684 (E.D.Pa.1996)	15, 16, 17, 18
Hartfield v. East Grand Rapids Pub. Sch., 960 F. Supp. 1259 (W.D. Mich. 1997)	16

Cited Authorities

Page

Joseph M. ex rel Kimberly F. v. Southeast Deco School District, 2001 WL 283154 (E.D. Pa. 2001) 17

Krebs v. Rutgers, 797 F. Supp. 1246 (D.N.J. 1992) 16

Lugar v. Edmondson Oil Co., 457 U.S. 922, 73 L. Ed. 2d 482, 102 S. Ct. 2744 (1982) 12, 14

Maynard v. Greater Hoyt Sch. Dist. No. 61-4, 876 F. Supp. 1104 (D.S.D. 1995) 16

Meury v. Eagle-Union Community Sch. Corp., 714 N.E.2d 233 (Ind. App. 1999) 19

National Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 109 S. Ct. 454, 102 L. Ed. 2d 469 (1988) 12

Norris v. Board of Educ. of Greenwood Community School Corp., 797 F. Supp. 1452 (S.D. Ind. 1992) 18, 19

Norwood v. Slammons, 788 F. Supp. 1020 (W.D. Ark. 1991) 16

Sean R. v. Board of Educ., 1992 U.S. Dist. LEXIS 11713 (D.C.Conn. 1992) 16

Cited Authorities

Page

Sirohi v. Trustees of Columbia University, 1996 US Dist. LEXIS 1737 (SDNY 1996) 16

Smith v. Duquesne University, 612 F. Supp. 72 (W.D. Pa. 1985) 17, 18

Suter v. Artist M., 503 U.S. 347 (1992) 19, 20, 21, 22, 23, 24

Tarka v. Cunningham, 917 F.2d 890 (5th Cir. 1990) 16

United States v. The Miami University, 91 F. Supp.2d 1132 (S.D. Ohio 2000) 16

Warner v. St.Bernard Parish School Bd., 1998 WL 50016, 1998 US Dist. LEXIS 1360 (E.D.La. 1998) 16

Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498 (1990) ..... *passim*

Wright v. Roanoke Redevelopment & Housing Auth., 479 U.S. 418 (1987) ..... *passim*

Page

United States Constitution:

Fourteenth Amendment 12

Statutes:

20 U.S.C. § 1232g 1

20 U.S.C. § 1232g(b) 17

42 U.S.C. § 1232g(b)(1) 23, 27

42 U.S.C. § 1232g(b)(1)(B) 24

42 U.S.C. § 1232g(b)(1)(F) 24

42 U.S.C. § 1232g(b)(2) 27

42 U.S.C. § 1232g(b)(3) 24

42 U.S.C. § 1232g(b)(5) 24

42 U.S.C. § 1232g(d) 23

42 U.S.C. § 1232g(e) 24

42 U.S.C. § 1232g(f) 22

42 U.S.C. § 1232g(4)(A) 24

Page

42 U.S.C. § 1232(2)(A) 23

42 U.S.C. § 1232g(4)(B) 24

42 U.S.C. § 1983 ..... *passim*

Washington Administrative Code, 180-75-082(3) ... 3

Washington Administrative Code, 180-79A 3

Washington Administrative Code, 180-86 3

St. Reg. 97-04-088 3

Other Authorities:

99 C.F.R. pt. 99 1

34 C.F.R. § 99.4 25

34 C.F.R. § 99.5 25

34 C.F.R. § 99.30(a) 25

34 C.F.R. § 99.30(b) 25

34 C.F.R. § 99.32 25

34 C.F.R. § 99.33 25

34 C.F.R. § 99.67(a)(1)-(3) 23

STATUTORY PROVISIONS INVOLVED

Relevant portions of the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g, and regulations promulgated thereunder by the Secretary of the Department of Education, 99 C.F.R. pt. 99, are set forth in the appendix.

INTRODUCTION

This case presents the unusual situation of a disclosure practice between a private college and a state agency under which sensitive education record information about students was casually and routinely shared, without the students' consent and outside of the disclosures permitted or required by state regulation. The disclosure practice violated the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g (FERPA), to which both the private college and the state agency were subject. The suit below — which originally did not include a claim under 42 U.S.C. § 1983, but only state law claims — was brought by a student injured when false allegations that he had stalked and raped another student passed, as a result of this disclosure practice, from the privacy of his education records into the "public record" environment of the state agency. A claim under § 1983 was added when the private college defended on the basis that its offending disclosures were required by state law and were in response to instructions from the state agency, and that its employees were acting for the state in making the disclosures.

The Court's review is not warranted. The conflict which Petitioner suggests exists with the Third Circuit Court of Appeals is not implicated by this case, which did not involve an isolated education record disclosure but rather (as pointed out by the Washington Supreme Court) the type of "policy

or practice" of offending disclosures which is unambiguously forbidden by FERPA. And although private colleges do not often act "under color of state law," the private college's defense that its offending disclosure practice was requested and required by state agents brings the circumstances of this case squarely within the Court's state action jurisprudence. Finally, because the case presents unusual facts, including the convergence of a private defendant and no allegation of a Constitutional deprivation, a decision in this case would have limited application.

STATEMENT OF THE CASE

As the Washington Supreme Court acknowledged, the witnesses presented widely divergent accounts of the facts in this case. Gonzaga's Petition persists in citing only the inconsistent and discredited testimony of its own employees. Despite consistent testimony from the witnesses having personal knowledge of the relationship between John Doe and Jane Doe that no stalking or rape ever occurred; despite the jury's determination that John Doe was defamed and substantially damaged; and despite the jury's finding of conduct on Gonzaga's part sufficiently blameworthy to support an award of punitive damages, Gonzaga persists in its Petition in referring to John Doe as an "alleged assailant." The jury determined by clear and convincing evidence that Gonzaga's reports of sexual misconduct on John Doe's part were false and that they were made with actual malice.

Nor, as the Petition states, was Gonzaga confronted with "another student's accusation that [John Doe] sexually assaulted her." Gonzaga's investigation was prompted not by a complaint by any victim, but by an interloper, Julia Lynch. Gonzaga personnel admitted knowing from the

outset of the investigation that Jane Doe denied she had been raped when Lynch spoke to her in December 1992 (Petitioner's App. 32a) and that Jane was angry to learn in October 1993 that Lynch had brought the subject up again; again refusing to make a complaint. (Petitioner's App. 4a.) As observed by the Washington Supreme Court, by the time the case went to trial, Jane Doe had testified consistently in two depositions that she had not been sexually assaulted nor had she accused John Doe of sexual assault. (Petitioner's App. 7a.)

Matters germane to John Doe's § 1983 claim are not fully described by the Petition. On March 4, 1994, Doe, a recent graduate of Gonzaga's teacher education program, who was in the process of completing his application for teacher certification, made his final payment of fees and tuition to Gonzaga. That same day, he received a call from the office of the Dean of the School of Education, telling him that he needed to come in to see Dean Corrinne McGuigan. When Doe arrived at McGuigan's office, he was escorted to a private room. The dean handed him a letter without comment and then left him to read it. The letter stated that because of allegations of sexual assault against him, the source of which was not identified, the dean would not give him the moral character affidavit required to support his certification to teach.

The dean's moral character affidavit required at the time by § 180-[illegible]-082(3) of the Washington Administrative Code (WAC)[1] was one of a number of documents that teacher education graduates applying to teach in Washington schools

1. As noted by Petitioners, WAC 180-75-082(3) (1989) was repealed by St. Reg. 97-04-088 (Mar. 8, 1997) and reenacted as part of WAC 180-79A and 180-86.

were required to submit to the Office of the Superintendent of Public Instruction (OSPI). The dean was required to prepare the affidavit by conferring with several faculty members who personally knew the student applicant and then to attest, if appropriate, that neither the faculty members nor the dean have "knowledge that the applicant has been convicted of any crime or has a history of any serious behavioral problems." Other documents the applicant was required to obtain and file to demonstrate his character and fitness included, *inter alia*, the applicant's own moral character affidavit, a questionnaire including character references, and a fingerprint check.

Through the student-controlled application process prescribed by the regulations, Gonzaga enjoyed the opportunity, consistent with the requirements of FERPA, to provide notice to OSPI of moral character concerns about teacher education graduates seeking state certification.[2] The formal regulatory process insured that OSPI would get the needed information, but through a procedure in which a student who received a qualified affidavit (an affidavit in which the dean identified knowledge of criminal convictions or a history of serious behavioral problems) could seek to correct any error in the dean's information. And since it was the student's obligation to procure and provide the affidavit, a student would have the ultimate option, if the dean's affidavit information would be embarrassing or fatal to the application, of not applying for certification at all. That this was an important option for applicants had been demonstrated

2. Disclosure of any education record information would be permitted under FERPA, where it was the student who was required to procure the affidavit and submit it, or authorize it to be submitted, to OSPI. As contemplated by the regulations, consent by the student to disclosure would be an inherent part of the process.

by the Washington Supreme Court's decision in *Brouillet v. Cowles Pub. Co.*, 114 Wash. 2d 788, 791 P.2d 526 (1990), which held that reports to OSPI of concerns of sexual misconduct on the part of teachers were public records subject to public disclosure. Indeed, the Supreme Court had required disclosure in *Brouillet* of reports of sexual misconduct received by OSPI even where the accused teacher had voluntarily resigned based on administrative guarantees of confidentiality. 114 Wash. 2d at 794.

Upon reading Dean McGuigan's letter, Doe demanded to know who was making allegations of sexual assault against him. McGuigan would not say. Doe immediately walked to the office of the college's Corporation Counsel and demanded to know from him who was making the allegations. Corporation Counsel would not say. Doe gave explicit written instruction to Gonzaga following the meeting not to forward any affidavit to OSPI without his review and approval. Trial Exhibit 217. When Doe and his parents asked about his rights to appeal the determination, they were told there were none.

Doe then made a demand under FERPA for Gonzaga's records pertaining to the dean's letter and the claimed allegations of sexual assault. Trial Exhibit 4. It was through education records released to him in response to his FERPA request that he learned that an "investigation" had been going on since the prior October. He learned that the investigation was prompted when Roberta League, the school's certification officer, overheard a conversation in which Julia Lynch expressed dissatisfaction that the school declined to investigate Lynch's concern, one year before, that Jane Doe had complained of sexual pain resulting from intercourse with John Doe. (Petitioner's App. 2a.) League recognized John Doe's name as that of a teacher education student.

Through Doe's FERPA request, he learned that the ensuing investigation had been incompetently conducted[3] and resulted in the generation of a number of records reflecting shockingly false allegations about his and Jane's relationship, including allegations of multiple violent rapes and sodomy, including with foreign objects. Trial Exhibit 6.

Doe also learned at about the same time that his right under state certification regulations to control his own application and not to have damaging information forwarded to OSPI without his consent, and his right under FERPA to seek correction of Gonzaga's records were in each case moot, since League and others had already "informally" shared personally-identifiable information about the allegations with OSPI personnel. Doe's instruction to Gonzaga not to pass along the allegations had been pointless. The allegations had been passed along in violation of FERPA months earlier, and were already reflected in OSPI's files. Trial Exhibit 34.

Doe sued Gonzaga University and Jane Doe for defamation and Gonzaga for invasion of privacy, breach of contract and negligence. Gonzaga responded by defending its conduct on grounds that in providing information "informally" to OSPI, it had been abiding by instructions from the state. Gonzaga affirmatively defended against Doe's claims by contending that "Gonzaga University and its agents were acting pursuant to statutory authority and/or public policy and are absolutely immune from any and all claims herein made by plaintiff." (Answer, Affirmative Defenses, Counterclaim & Third Party Complaint, p. 7, CP 30.) In a

3. The jury found Gonzaga liable for negligence and awarded damages for that claim. The Washington Supreme Court reversed that part of the award, holding that Gonzaga had had no "duty" to conduct the investigation in the first place. Petitioner's App. at 16a.

counterclaim and third party complaint for declaratory relief, Gonzaga asked the court to determine that its employees' passing along this damaging information to OSPI was required by its partnership with OSPI in the teacher certification process:

> 1.6 Defendant's actions were mandated by the laws and regulations of the State of Washington. Defendant seeks declaratory judgment from this Court finding that the University is obligated by law to report the information it received pertaining to the incidents involving John Doe and Jane Doe to the Office of the Superintendent of Public Instruction in order that the Office of the Superintendent of Public Instruction could determine whether further investigation of John Doe's application for teaching certificate was necessary. . . .
>
> 1.8 In the course of performing its duty to report knowledge and information of good moral character and personal fitness of plaintiff, defendant Gonzaga University contacted the OSPI to ascertain whether the allegations by Jane Doe against plaintiff were such that they needed to be reported to the OSPI. The OSPI confirmed that defendant was required to report allegations of this type to the OSPI and directed defendant to report the information.
>
> 1.9 Since Gonzaga University was acting in accordance with instructions from the OSPI and OSPI administrative procedures when it

> reported the information pertaining to plaintiff, the administrative agency is a proper and necessary party to this litigation which involves interpretation and enforcement of statutes and regulations which the agency is required to implement.
>
> 1.10 Gonzaga University justifiably relied upon and deferred to the direction given by the authorized agents of the OSPI.

(Answer, Affirmative Defenses, Counterclaim & Third Party Complaint, pp. 7-9, CP 30-32.) Gonzaga then filed a motion for summary judgment dismissal of the defamation claims, contending that its actions were "absolutely privileged," and in support filed the affidavit of Roberta League. League elaborated on the working relationship with and direction taken from the state:

> Upon request, from time to time OSPI provides guidance and advice to the various approved teacher education programs in regard to issues relating to student teacher preparation and certification of prospective teachers. In our meetings and discussions with OSPI, concern for assuring the fitness and suitability of student teachers and applicants for teacher certification are periodically discussed. In those discussions, those concerns are recognized and acknowledged to be shared, common concerns of both OSPI and our School of Education in carrying out our respective roles as to student preparation and certification. A close working relationship exists between OSPI and the personnel in the Gonzaga

> University School of Education who, respectively, are involved in teacher certification matters. After I began working as a Certification Specialist at Gonzaga University, during training which I received from OSPI, I was advised that if information came to my attention regarding behavioral problems which might be of concern to me relative to a student's fitness for teaching and certification, such should be brought to OSPI's attention for purposes of review and possible investigation by OSPI.
>
> Accordingly, from time to time I have contacted and consulted with Adelle Nore in the Office of Professional Practices (OPP) of OSPI to gain advice and guidance regarding behavioral or other issues which I thought might be of concern and which might be pertinent to the WAC 180-75-082(3) affidavit which the Dean of our School of Education would be called upon to provide for an applicant. It was in that context that I contacted OSPI in regard to matters which had come to my attention relating to John Doe (the plaintiff in Cause No. 94-203120-6 pending in Spokane County Superior Court). In doing so, I acted in good faith in carrying out what I considered to be my responsibility owing to Gonzaga University, to OSPI and to the public.

Trial Exhibit 45. It was following these averments by Gonzaga that its FERPA violations had been state-directed that John Doe amended his complaint to include a claim under § 1983.

That Gonzaga and OSPI were both complicit in the FERPA violation was borne out by evidence at trial. As summarized by the Washington Supreme Court, the testimony of OSPI investigator Adelle Nore and others established that state personnel and Gonzaga had settled into an extra-regulatory, unconsented-to information-sharing process, violative of FERPA, whereby Gonzaga personnel would give Nore a heads up on prospective applicants who might present "cause for concern." Because "cause for concern" was the standard, the information-sharing practice was self-selective for information damaging to students:

> Gonzaga's alleged violation of FERPA rights grew out of a disclosure practice developed by Gonzaga personnel and OSPI. The jury heard testimony that Gonzaga personnel routinely called OSPI, before a student's application for certification was submitted, to talk about students as to whom they had "cause for concern" and to obtain advice. Nore testified that the calls about John Doe that OSPI received from League and others were typical of conversations she had with Gonzaga personnel. In preapplication conversations, Nore would often be told the names of the student candidates. Substantial evidence supports a determination that Gonzaga had a "policy or practice" of disclosing personally identifiable information contained in education records — in violation of FERPA.

(Petitioner's App. at 19a.)

Based on evidence of Gonzaga's policy and practice of passing along damaging personally-identifiable education record information about teacher education students — and

in John Doe's case, spurious allegations of rape and stalking, which were passed into the public records environment of a state agency — the jury awarded Doe $150,000 in actual damages. The jury was properly instructed on the standards for awarding punitive damages and was presented with evidence as to the tens of millions of dollars in federal funds received by Gonzaga annually in exchange for its undertakings to protect student privacy rights.[4] The jury unanimously awarded Doe $300,000 in punitive damages.

REASONS FOR DENYING THE WRIT

I. THE JOINT PARTICIPATION OF GONZAGA AND THE OFFICE OF THE SUPERINTENDENT OF PUBLIC INSTRUCTION IN THE FERPA VIOLATION AND GONZAGA'S DEFENSE OF THE OFFENDING DISCLOSURES AS STATE-DIRECTED BRINGS THE CIRCUMSTANCES OF THIS CASE SQUARELY WITHIN THIS COURT'S "STATE ACTION" JURISPRUDENCE.

A claim under § 1983 embodies at least two elements. The plaintiff is first bound to show that they have been deprived of a right "secured by the Constitution and laws" of the United States. They must secondly show that the defendant deprived them of this right acting "under color of state law." The Court has held it clear that these two elements denote two separate areas of inquiry. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 150 (1970); *Flagg Bros., Inc. v. Brooks*, 98 S. Ct. 1729, 1733, 436 U.S. 149 (1978).

---

4. Evidence showed that in the four academic years preceding the time of trial, Gonzaga's receipt of federal funds had ranged between $23 million and $30 million each year. Trial Exhibit 54.

Where it is alleged that the right deprived was a right secured by the Constitution, answering the first, "deprivation" element ordinarily advances a determination whether the defendant was a "state action." With limited exceptions, there can be no Constitutional deprivation absent "state action." Thus, in a number of the cases cited by Petitioner and which deal with alleged deprivations of due process, one can not determine whether there was a deprivation of due process without determining the issue of state action. If there is no state action, then no process is Constitutionally due.

In *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), the Court discussed the relationship between the "state action" requirement of the Fourteenth Amendment and the "color of state law" requirement of § 1983, and concluded that conduct that constitutes "state action" for Fourteenth Amendment purposes also constitutes action "under color of state law" for purposes of § 1983. It noted, however, that the converse was not necessarily true, n.18, 457 U.S. at 935. Although the Court continues to note this distinction between Constitutional cases and cases involving deprivations of rights under federal laws, there is a tendency, where the presence of "state action" will satisfy the "color of state law" requirement, to use the terms and standards interchangeably. *See National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179 (1988), *Brentwood Academy v. Tennessee Secondary School Athletic Association, et al.*, 531 U.S. 288 n.2 (2001). In Constitutional cases, the second, "color of state law" element is effectively answered by answering the first, "deprivation" element.

Where, as here, the deprivation alleged is one of rights under federal laws having application to public and private

actors, however, the deprivation element can be answered first and independently. Thus, in this case, Gonzaga could be found to have deprived John Doe of a right under FERPA without first asking whether Gonzaga was a state actor, because FERPA is equally applicable to private institutions accepting federal funding. There need be no general "state action" evaluation into the background or purpose for Gonzaga's and OSPI's dealings. Having found the very specific deprivation of John Doe's rights under FERPA — Gonzaga's passing along allegations of rape and stalking as a part of its extra-regulatory, unconsented-to information-sharing practice with OSPI — one turns to the second element of whether that information-sharing took place "under color of state law."

Petitioner's argument about the "color of state law" issue fails to consider the specific deprivation that requires review for its state action incidents. Petitioner treats the case as if the deprivation being complained about were that Gonzaga "made a recommendation to the state," (Pet. for Cert., p. 17), or that it "complied with a state law requirement that a university official submit moral character affidavits to OSPI," *id.*, or that it merely "suppl[ied] information that pertains to a government decision," (Pet. for Cert., p. 18.)

But the deprivation of FERPA rights was the extra-regulatory unconsented-to conversations themselves, and the passing-along of damaging information from private education records to the public records of a state agency. The state was a party to those conversations. The state encouraged those conversations. Indeed, according to the League Affidavit, notwithstanding that the state was likewise subject to FERPA, state agents "trained" Gonzaga personnel that such conversations could and should take place. And

both League and Dr. Janet Burcalow, Gonzaga's dean's designee, having had the state training, testified that they viewed themselves as acting for the state in their communications with OSPI about certification. (Petitioner's App., at 22a.)

This Court has described its decisions in the state action area as seeking to assure that constitutional standards are invoked "when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains," such that "the deed of an ostensibly private organization or individual is to be treated sometimes as if a State had caused it to be performed." *Brentwood Academy v. Tennessee Secondary Sch. Ath. Ass'n, et al.*, 531 U.S. 288, 295 (2001). The Court has consistently held that the issue of state action is a "necessarily fact-bound inquiry." *Id.*, 531 U.S. at 298, citing *Lugar*, 457 U.S. at 939. The Court's recent decision in *Brentwood Academy* surveyed a "host of facts" that prior decisions established can bear on the fairness of attributing private action to the state:

> We have, for example, held that a challenged activity may be state action when it results from the State's exercise of "coercive power," *Blum, 457 U.S. at 1004,* when the State provides "significant encouragement, either overt or covert," *ibid.* or when a private actor operates as a "willful participant in joint activity with the State or its agents," *Lugar, supra, at 941* (internal quotation marks omitted). We have treated a nominally private entity as a state actor when it is controlled by an "agency of the State," *Pennsylvania v. Board of Directors of City Trusts*

> *of Philadelphia, 353 U.S. 230, 231, 1 L. Ed. 2d 792, 77 S. Ct. 806 (1957) (per curiam)*, when it has been delegated a public function by the State, cf., *e.g., West v. Atkins, supra, at 56; Edmonson v. Leesville Concrete Co., 500 U.S. 614, 627-628, 114 L. Ed. 2d 660, 111 S. Ct. 2077 (1991)*, when it is "entwined with governmental policies" or when government is "entwined in [its] management or control," *Evans v. Newton, 382 U.S. 296, 299, 301, 15 L. Ed. 2d 373, 86 S. Ct. 486 (1966).*

The Washington Supreme Court correctly held that given OSPI's joint participation in, and encouragement of, the FERPA violation, "color of state law" was properly an issue of fact for the jury. (Petitioner's App., at 22a.)

II. VIRTUALLY NO CONFLICT EXISTS WITHIN THE FEDERAL COURTS AS TO FERPA'S CREATION OF FEDERAL RIGHTS.

The Petition greatly overstates the extent of conflict in the case law as to whether FERPA violations are actionable deprivations of rights under § 1983. Contrary to the Petition, the Washington Supreme Court's decision does not conflict with the Third Circuit Court of Appeals' summary affirmance at 114 F.3d 1172 (3d Cir. 1997) of *Gundlach v. Reinstein*, 924 F. Supp. 684 (E.D.Pa.1996). Both decisions acknowledge — Washington's explicitly, and the Eastern District of Pennsylvania's implicitly — that FERPA creates rights in students and their parents to be free from a school's "policy or practice" of violative disclosures. And at the present time, there is no conflict among the Courts of Appeals; all reviewing the issue have held that FERPA does create

rights that can be redressed in actions brought under § 1983. *Fay v. South Colonie Cent. Sch. Dist.*, 802 F.2d 21, 33 (2d Cir. 1986) and *Brown v. City of Oneonta*, 106 F.3d 1125, 1131 (2d Cir. 1997); *Tarka v. Cunningham*, 917 F.2d 890, 891 (5th Cir. 1990), *Falvo ex rel. Pletan v. Owasso Indep. Sch. Dist. No. I-011*, 233 F.3d 1203 (10th Cir. 2000), *cert. granted*, 150 L. Ed. 2d 715, 121 S. Ct. 2547 (2001). A number of district courts have reached the same conclusion.[5]

In *Gundlach*, the district court did not hold that no plaintiff could seek redress for a FERPA violation under § 1983, but only that "Mr. Gundlach cannot seek redress pursuant to a FERPA-based § 1983 claim *under the facts alleged in support of the proposed claim*." 924 F. Supp. at

5. The following decisions hold that FERPA creates rights actionable under 42 U.S.C. § 1983: *Belanger v. Nashua Sch. Dist.*, 856 F. Supp. 40, 47-48 (D.N.H. 1994), *Sean R. v. Board of Educ.*, 1992 U.S. Dist. LEXIS 11713 (D.C.Conn. 1992), *Altschuler v. University of Pennsylvania Law School*, 1997 WL 129394 (SDNY 1997), *Sirohi v. Trustees of Columbia University*, 1996 US Dist. LEXIS 1737 (SDNY 1996), *Krebs v. Rutgers*, 797 F. Supp. 1246 (D.N.J. 1992), *Warner v. St.Bernard Parish School Bd.*, 1998 WL 50016, 1998 US Dist. LEXIS 1360 (E.D.La. 1998), *Doe v. Knox County Bd. Of Ed.*, 918 F.Supp. 181, 184 (E.D.Ky. 1996), *citing unpublished Sixth Circuit decision, Cullens v. Bemis*, No. 91-73980, 1992 WL 337688 (1992), *Hartfield v. East Grand Rapids Pub. Sch.*, 960 F. Supp. 1259 (W.D. Mich. 1997), *Adams v. Lewis University*, 1999 US Dist. LEXIS 3413 (N.D.Ill. 1999), *Maynard v. Greater Hoyt Sch. Dist. No. 61-4*, 876 F. Supp. 1104, 1107 (D.S.D. 1995), *Achman v. Chisago Lakes Indep. Sch. Dist. No. 2144*, 45 F. Supp.2d 664, 673 (D. Minn. 1999), *Francois v. University of District of Columbia*, 788 F. Supp. 31 (D.D.C. 1992), *aff'd*, 1993 US App. LEXIS 5051 (App. D.C.), *United States v. The Miami University*, 91 F. Supp.2d 1132 (S.D. Ohio 2000), *Norwood v. Slammons*, 788 F. Supp. 1020, 1026 (W.D. Ark. 1991).

692 (emphasis added). Indeed, the district court in *Gundlach* held that a careful reading of § 1232g(b) reveals "a Congressional intention to impose a mandatory obligation on participating institutions, such that it may not have in place a 'policy or practice of permitting the release of education records.'" What the court viewed as actionable, then, was a release of such record information as a matter of policy or practice. As noted by the court, however, "since Mr. Gundlach has failed to allege that Defendants maintain a policy . . . but instead bases his claim on one instance of alleged noncompliance, we would conclude that the Congress has not unambiguously expressed the 'right' he seeks to enforce." *Id.* at 690 n.7. The unreported decision in *Joseph M. ex rel Kimberly F. v. Southeast Deco School District*, 2001 WL 283154 (E.D. Pa. 2001) dealt only with a plaintiff's request for litigation sanctions based on the defendant's filing of unredacted education records with the court, in violation of both FERPA and an interim order requiring filing under seal. The court's denial of the sanctions, citing *Gundlach*, 2001 WL 283154 at *10, is fully consistent with the isolated nature of the disclosure and the absence of any policy or practice.

Smith v. Duquesne University, 612 F. Supp. 72 (W.D. Pa. 1985), also cited by Petitioner as conflicting, was not a § 1983 case, but addressed whether FERPA created an implied right of action; an issue decided with reference to *Cort v. Ash*, 422 U.S. 66, 78 (1975). *Smith* likewise held, in addressing the purpose of the statute, that FERPA was adopted to address systematic, "not individual," violations of students' privacy and confidentiality rights. 612 F. Supp. at 79. Respondent knows of no case which has adopted the absurd view that an institution's release of educational records in violation of FERPA must be uniform and pervasive

to be actionable. The notion that an institution could have any policy or practice of disclosure falling short of universal would render FERPA meaningless, indeed. What has been required of plaintiffs in stating a claim, including by *Gundlach* and *Smith v. Duquesne*, is a "policy or practice" of releasing personally-identifiable information in some context.

John Doe's claim was always a "policy or practice" claim, never an "individual release" claim. His First Amended Complaint, which added the § 1983 claim, alleged, *inter alia*, that "The disclosure to OSPI of the personally identifiable information concerning John Doe was pursuant to Gonzaga University's practice or policy that disclosure under such circumstances was and is appropriate." (First Amended Complaint, ¶ 2.51, p. 12, CP 1792.) The jury instructions appropriately set forth the requirement that Doe prove a policy or practice. (CP 1497.)

As acknowledged by the Washington Supreme Court, the jury was presented evidence that OSPI was "routinely called" by Gonzaga representatives to talk about student applications presenting cause for concern and was "often provided" with the names of the student candidates. The Court concluded that "substantial evidence supports a determination that Gonzaga had a 'policy or practice' of disclosing personally identifiable information contained in education records — in violation of FERPA." (Petitioner's App. 19a [reproduced *supra*].)

Only two lower court decisions, both arising out of the same federal district, hold that even a policy or practice of FERPA violations can not be a predicate to a claim for damages under § 1983. *Norris v. Board of Educ. of*

Greenwood Community School Corp., 797 F. Supp. 1452 (S.D. Ind. 1992) summarily dismissed the plaintiff's § 1983 claim, asserting, without illustration or explanation, that FERPA gives enforcement power to the Secretary of Education and "provides an exclusive enforcement mechanism." 797 F. Supp. at 1465. *But see Blessing v. Freestone*, 520 U.S. 329, 346-347, 117 S. Ct. 1353, 1362, 137 L. Ed. 2d 569, 586 (1997) (observing that absent a federal statute's expressly curtailing § 1983 actions, a defendant must make the "difficult showing that allowing § 1983 actions to go forward in these circumstances 'would be inconsistent with Congress' carefully tailored scheme;'" and observing that the Court has only found such Congressional intent where the statute created its own statutory or administrative remedies addressing the same harms.) The Indiana appellate decision in *Meury v. Eagle-Union Community Sch. Corp.*, 714 N.E.2d 233 (Ind. App. 1999) relied on *Norris*, 714 N.E.2d at 239 (although pointing out as an additional basis for rejecting the claim that the Mourns had failed to allege any "policy or practice" of disclosure. *Id.*)

The case law does not therefore present a conflict of the sort that warrants the Court's review.

III. THE OVERWHELMING MAJORITY OF FEDERAL COURTS HAVE CORRECTLY DECIDED THE ISSUE OF WHETHER FERPA CREATES RIGHTS IN STUDENTS AND THEIR PARENTS UNDER ALL OF THE COURT'S PRECEDENTS, INCLUDING *SUTER v. ARTIST M.* AND *BLESSING v. FREESTONE*.

The Greek root of the word "heresy" connotes picking and choosing from settled doctrine to selectively emphasize what one finds appealing at the expense of what one finds

disagreeable. With this sense of the word in mind, Gonzaga's interpretation of federal rights enforceable under 42 U.S.C. § 1983 should be anathema. In particular, Gonzaga isolates language from *Suter v. Artist M.*, 503 U.S. 347 (1992), and one detail from *Blessing v. Freestone*, 520 U.S. 329 (1997), at the expense of settled doctrine expressed in *Wright v. Roanoke Redevelopment & Housing Auth.*, 479 U.S. 418 (1987), and *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498 (1990), and subsequently approved in *Blessing*.

The Washington Supreme Court correctly determined that FERPA creates enforceable federal rights using the proper test. The test, summarized in *Blessing* and derived from *Wright* and *Wilder*, has three parts:

> First, Congress must have intended that the provision in question benefit the plaintiff. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so vague and amorphous that its enforcement would strain judicial competence. Third, the statute must unambiguously impose a binding obligation on the States.

520 U.S. at 340-341 (citations omitted). Gonzaga cites this test in a parenthetical comment as an afterthought. (Pet. for Cert., p. 11.)

Instead, Gonzaga focuses on *Suter*. The only principle that it culls from the case is the requirement that federal rights derived from Congress' spending power must be "unambiguous." (Pet. for Cert., p. 9.) Applying this principle, Gonzaga argues that FERPA rights are unenforceable under § 1983 because "nothing in the statute" gives "notice that

individual alleged instances of unconsented disclosure of education records would subject them to private damages actions by students and parents." (Pet. for Cert., p. 10.)

Gonzaga overstates the principle that it draws from *Suter*. Initially, Gonzaga wrongly implies that it is the availability of "private damage actions" that must be "unambiguous," rather than the federal rights underlying the private damages actions. Nothing in *Suter* suggests that the focus should be on the availability of private damages actions. To the contrary, *Suter* confirms that the proper focus is whether the statutory language creates "enforceable rights, privileges, or immunities" within the meaning of § 1983. 503 U.S. at 357 (quoting *Wright*).

To read *Suter* as requiring unambiguous congressional intent to create private damages actions (rather to create enforceable federal rights) is actually contrary to *Blessing*, *Wilder*, and *Wright*. Once it is determined that a statute creates enforceable federal rights, a remedy under § 1983 is presumed. *Blessing*, 520 U.S. at 341; *Wilder*, 496 U.S. at 520-521. This Court "do[es] not lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy for the deprivation of a federally secured right." *Wright*, 479 U.S. at 423-424 (quotation omitted). In other words, the existence of § 1983 is itself unambiguous congressional intent to create private damages actions to remedy violations of other federal rights. Requiring additional intent serves only to undermine this already unambiguous expression of congressional intent.

Furthermore, Gonzaga wrongly treats *Suter* as if the reference to "unambiguous" intent superimposes another requirement on the three-part test. If there was any doubt

about this after *Suter* was decided, it was dispelled in *Blessing*. The fact that most of the cases cited by Gonzaga pre-date *Blessing* implicitly confirms this. In *Blessing*, the Court recapitulated the settled doctrine of *Wright* and *Wilder* without any additional gloss from *Suter*. 520 U.S. at 340-341.

Gonzaga is similarly selective in its reading of *Blessing* as in its reading of *Suter*. The only principle that it culls from *Blessing* is that federal rights do not exist in the absence of an "enforcement mechanism to command . . . [a] particular action." (Pet. for Cert., p. 10.) Applying this principle, Gonzaga argues that FERPA rights are unenforceable because the statute "contains no mechanism for sanction of individual disclosures of student information. The Secretary of Education cannot command . . . any particular action[.]" (Pet. for Cert., p. 11.) As with *Suter*, Gonzaga misreads *Blessing*.

In *Blessing*, the Court cited the lack of any enforcement mechanism merely as evidence that Title IV-D, a child support enforcement program, is not intended to benefit individual children and custodial parents, which is the first element of the test quoted above. 520 U.S. at 343-344. The Court did not elevate the existence of an enforcement mechanism into additional element of the test that must be satisfied.

In any event, Gonzaga is flat wrong when it asserts that "[t]he Secretary of Education cannot command . . . any particular action under FERPA but is authorized only to terminate federal funding." (Pet. for Cert., p. 11.) To the contrary, FERPA states that "[t]he Secretary shall take appropriate actions to enforce this section and to deal with violations of this section[.]" § 1232g(f). "Appropriate actions" include withholding of payments under any

applicable program, cease-and-desist orders, and complete termination of funding. 34 C.F.R. § 99.67(a)(1)-(3). In this sense, even if its reading of *Blessing* were correct, the principle Gonzaga derives from the case is inapplicable to FERPA.

In applying *Suter* and *Blessing*, Gonzaga misrepresents the nature of John Doe's claims. Gonzaga describes those claims as arising from "individual alleged instances of unconsented disclosure," and "for particular instances of disclosure." (Pet. for Cert., pp. 10-11.) Yet, as discussed above, there can be no question that John Doe's claims against Gonzaga were based on a "policy or practice" of disclosing student information in violation of FERPA. Viewing John Doe's FERPA claims in the proper light, it is evident that his rights are enforceable under § 1983.

To determine whether a statute creates enforceable federal rights, it is necessary to "analyze the statutory provisions in detail, in light of the entire legislative enactment." *Suter*, 503 U.S. at 357 (discussing *Wright* and *Wilder*). FERPA provides that no funds shall be made available to any educational agency or institution which has a policy or practice of permitting the release of education records or personally identifiable information contained therein without parental consent. § 1232g(b)(1), (2)(A). It provides that "whenever a student has attained eighteen years of age, or is attending an institution of postsecondary education, the permission or consent of *and the rights accorded to the parents of the student* shall thereafter only be required of and accorded to the student." § 1232g(d) (italics added). It further provides that no funds shall be made available to any educational agency or institution "unless such agency or institution effectively informs the parents of the

students, or the students . . . *of the rights accorded them by this section*." § 1232g(e) (italics added). The Secretary of Education is authorized to adopt "regulations or procedures . . . *which protect the rights of privacy of students*[.]" § 1232g(c) (italics added). Records of all disclosures must be maintained and made available for inspection by parents or students. § 1232g(4)(A). Even otherwise validly-disclosed educational records or other personally identifiable student information must be destroyed when they are "no longer needed." § 1232g(b)(1)(B), (F); *accord* § 1232g(b)(3), (5). These provisions bind not only educational agencies and institutions, but also the individuals or entities to whom they disclose educational records or other personally identifiable student information. § 1232g(4)(B).

FERPA regulations confirm that the statute creates enforceable federal rights. While these regulations do not necessarily create any additional rights not contained in the text of the statute, they illustrate the nature of the rights created in the statute, and it is appropriate to consider the regulations for this purpose. For example, in *Wilder*, holding that the Boren Amendment created federal rights to "reasonable" reimbursement for services enforceable by health care providers, this Court relied on regulations setting forth the factors determining reasonableness. 496 U.S. at 519 & n.17. Similarly, in *Wright*, holding that the Brooke Amendment created federal rights to a reasonable amount for the use of utilities enforceable by public housing tenants, this Court relied on regulations defining "rent" to include such utilities. 479 U.S. at 430. This Court also considered regulations in *Suter*, 503 U.S. at 363, and *Blessing*, 520 U.S. at 343-344, even though the statutes at issue in those cases were ultimately held not to create enforceable federal rights.

FERPA regulations contain sections addressed specifically to the rights of parents and students. 34 C.F.R. §§ 99.4, 99.5. They emphasize that "[t]he parent or eligible student shall provide a signed and dated written consent before an educational agency or institution discloses personally identifiable information from the student's education records," and they identify what the written consent must contain. *Id.* § 99.30(a), (b). They require records of all disclosures for review by students and their parents. *Id.* § 99.32. They place limitations on redisclosure or use of educational records or other personally identifiable information of a student by individuals or entities receiving them from an educational agency or institution. *Id.* § 99.33.

If the foregoing provisions of FERPA do not create enforceable federal rights, then no statute enacted under Congress' spending power could ever create enforceable federal rights. FERPA's focus on student privacy satisfies the first element of the proper test. As quoted above, the first element of the test requires that "Congress must have intended that the provision in question benefit the plaintiff." *Blessing*, 520 U.S. at 340-341. For example, in *Wright*, the Court held that the Brooke Amendment limiting rent charged by public housing authorities was "undeniabl[y]" intended to benefit the tenants. 479 U.S. at 430. Likewise, in *Wilder*, the Court held that the Boren Amendment requiring "reasonable" reimbursements for health care providers leaves "little doubt" that such providers are intended beneficiaries. 496 U.S. at 510. In a similar fashion, it cannot seriously be disputed that the myriad FERPA provisions guaranteeing privacy of educational records and other personal information and requiring consent for disclosure of such information, is intended to benefit students. There is no corresponding benefit to the educational agencies and institutions subject

to FERPA. In fact, the requirements of the Act undoubtedly create an administrative burden that they accept in exchange for federal funds.

The absolute nature of the privacy and consent rights afforded by FERPA satisfies the second element of the test. As quoted above, the second element of the test requires "that the right assertedly protected by the statute is not so vague and amorphous that its enforcement would strain judicial competence." *Blessing*, 520 U.S. at 340-341. For example, in *Wright*, the Court held that the right of public housing tenants to have "reasonable" amounts for utilities included within rent limits was not so vague and amorphous as to defeat enforcement. 479 U.S. at 430. Likewise, in *Wright*, the Court held the right of health care providers to receive "reasonable" reimbursements was sufficiently definite to be enforceable. By comparison, FERPA's absolute consent and privacy rights are far less vague and amorphous, and correspondingly easier to enforce.

The mandatory link between FERPA rights and funding satisfies the third element of the test. As quoted above, the third element of the test requires that "the statute must unambiguously impose a binding obligation on the States." *Blessing*, 520 U.S. at 340-341. The Court explained this element of the test in *Blessing* by stating "[i]n other words, the provision giving rise to the asserted right must be couched in mandatory rather than precatory terms." 520 U.S. at 341 (citing *Wilder*). For example, in *Wilder*, the Court held that the Boren Amendment imposed a binding obligation because "provision of federal funds is expressly conditioned on compliance with the amendment and the Secretary is authorized to withhold funds for noncompliance[.]" 496 U.S. at 512 (citation omitted). This type of binding obligation

is indistinguishable from that imposed by FERPA. § 1232g(b)(1), (2). Since all of the elements of the proper test are satisfied, the Washington Supreme Court correctly determined that John Doe has enforceable rights under FERPA.

CONCLUSION

Based on the foregoing, John Doe respectfully asks the Court to deny the petition.

Respectfully submitted,

LAUREL H. SIDDOWAY
Counsel of Record
GEORGE M. AHREND
DAVID J. GROESBECK
RANDALL & DANSKIN, P.S.
601 W. Riverside Ave., Ste. 1500
Spokane, WA 99201
(509) 747-2052

Submitted this 19th day of December 2001.

APPENDIX

APPENDIX

APPENDIX — RELEVANT STATUTES AND REGULATIONS

The Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g (FERPA), provides in pertinent part:

(b) Release of education records; parental consent requirement; exceptions; compliance with judicial orders and subpoenas; audit and evaluation of federally-supported education programs; recordkeeping

(1) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein . . .) of students without the written consent of their parents to any individual, agency, or organization, other than to the following –

(A) other school officials, including teachers within the educational institution or local educational agency, who have been determined by such agency or institution to have legitimate educational interests, including the educational interests of the child for whom consent would otherwise be required . . . .

(B) (i) authorized representatives of (I) the Comptroller General of the United States, (II) the Secretary, or (III) State educational authorities, under the conditions set forth in paragraph (3), or (ii) authorized representatives

of the Attorney General for law enforcement purposes under the same conditions as apply to the Secretary under paragraph (3) . . . .

(F) organizations conducting studies for, or on behalf of, educational agencies or institutions for the purpose of developing, validating, or administering predictive tests, administering student aid programs, and improving instruction, if such studies are conducted in such a manner as will not permit the personal identification of students and their parents by persons other than representatives of such organizations and such information will be destroyed when no longer needed for the purpose for which it is conducted . . . .

(2) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of release, or providing access to, any personally identifiable information in education records . . . unless –

(A) there is a written consent from the student's parents specifying records to be released, the reasons for such release, and to whom, and with a copy of the records to be released to the student's parents and the student if desired by the parents . . . .

(3) Nothing contained in this section shall preclude authorized representatives of (A) the Comptroller General of the United States, (B) the Secretary, or (C) State educational authorities from having access to student or other records which may be necessary in connection with the audit and evaluation of Federally-supported education programs, or in connection with the enforcement of the Federal legal requirements which relate to such programs: Provided, That except when collection of personally identifiable information is specifically authorized by Federal law, any data collected by such officials shall be protected in a manner which will not permit the personal identification of students and their parents by other than those officials, and such personally identifiable data shall be destroyed when no longer needed for such audit, evaluation, and enforcement of Federal legal requirements.

(4)(A) Each educational agency or institution shall maintain a record, kept with the education records of each student, which will indicate all individuals (other than those specified in paragraph (1)(A) of this subsection), agencies, or organizations which have requested or obtained access to a student's education records maintained by such educational agency or institution, and which will indicate specifically the legitimate interest that each such person, agency, or organization has in obtaining this information. Such record of access shall be available only to parents, to the school official and his assistants who are responsible for the custody of such records, and to

persons or organizations authorized in, and under conditions of, (A) and (C) of paragraph (1) as a means of auditing the operation of the system.

(B) With respect to this subsection, personal information shall only be transferred to a third party on the condition that such party will not permit any other party to have access to such information without the written consent of the parents of the student. If a third party outside the educational agency or institution permits access to information in violation of paragraph (2)(A), or fails to destroy information in violation of paragraph (1)(F), the educational agency or institution shall be prohibited from permitting access to information from education records to that third party for a period of not less than five years.

(5) Nothing in this section shall be construed to prohibit State and local educational officials from having access to student or other records which may be necessary in connection with the audit and evaluation of any federally or State supported education program or in connection with the enforcement of the Federal legal requirements which relate to any such program, subject to the conditions specified in the proviso in paragraph (3).

(c) **Surveys or data-gathering activities; regulations** Not later than 240 days after October 20, 1994, the Secretary shall adopt appropriate regulations or procedures, or identify existing regulations or procedures, which protect the rights of privacy of students and their families in connection with any surveys or data-gathering activities conducted, assisted, or authorized by the Secretary or an administrative head of an education agency. Regulations established under this subsection shall include provisions controlling the use, dissemination, and protection of such data . . . .

(d) **Students' rather than parents' permission or consent** For purposes of this section, whenever a student has attained eighteen years of age, or is attending an institution of postsecondary education, the permission or consent of and the rights accorded to the parents of the student shall thereafter only be required of and accorded to the student.

(e) **Informing parents or students of rights under this section** No funds shall be made available under any applicable program to any educational agency or institution unless such agency or institution effectively informs the parents of students, or the students, if they are eighteen years of age or older, or are attending an institution of postsecondary education, of the rights accorded them by this section.

Appendix

(f) Enforcement; termination of assistance The Secretary shall take appropriate actions to enforce this section and to deal with violations of this section, in accordance with this chapter, except that action to terminate assistance may be taken only if the Secretary finds there has been a failure to comply with this section, and he has determined that compliance cannot be secured by voluntary means.

Appendix

Regulations adopted by the Secretary of the Department of Education pursuant to FERPA, 34 C.F.R. pt. 99, provide in pertinent part:

§ 99.2 What is the purpose of these regulations? The purpose of this part is to set out requirements for the protection of privacy of parents and students under [FERPA].

§ 99.4 What are the rights of parents? An educational agency or institution shall give full rights under the Act to either parent, unless the agency or institution has been provided with evidence that there is a court order, State statute, or legally binding document relating to such matters as divorce, separation, or custody that specifically revokes those rights.

§ 99.5 What are the rights of students? (a) When a student becomes an eligible student, the rights accorded to, and consent required of, parents under this part transfer from the parents to the student. (b) The Act and this part do not prevent educational agencies or institutions from giving students rights in addition to those given to parents.

Appendix

§ 99.67 How does the Secretary enforce decisions?
(a) If the educational agency or institution does not comply . . . the Secretary may . . . (1) Withhold further payments under any applicable program; (2) Issue a compliant to compel compliance through a cease-and-desist order; or (3) Terminate eligibility to receive funding under any applicable program.